IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

SA.No. 879 of 1994(D)

AS.20/1990 of PRINCIPAL SUB COURT,KOCHI
OS.773/1987 of PRL.M.C., KOCHI

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APPELLANTS/RESPONDENTS/DEFENDANTS:

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1. JOHN, S/O.LATE LONAN, RESIDING AT MALIYAKKAL EDAVANAKAD MURI AND VILLAGE, COCHIN TALUK

2. DAVIS, S/O.LATE LONAN, RESIDING AT MALIYAKKAL EDAVANAKAD MURI AND VILLAGE, COCHIN TALUK

3. JUSTIN, S/O.LATE LONAN, RESIDING AT MALIYAKKAL EDAVANAKAD MURI AND VILLAGE, COCHIN TALUK

BY ADV. SRI.K.A.JALEEL

RESPONDENT/APPELLANT/PLAINTIFF:

RAJEEV, S/O.NARAYANAN, RESIDING AT THUNDIYIL, EDAVANAKAD MURI, EDAVANAKAD VILLAGE, COCHIN TALUK.

BY ADV. SRI.K.G.BALASUBRAMANIAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO. 1950/94 IN SA 879/94

DISMISSED

2/8/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

S.A.NO.879 OF 1994

Dated 2nd August 2007

J U D G M E N T

Defendants in O.S.773 of 1987 on the file of Munsiff court, Kochi are appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that he is in possession of 2 acres 11½ cents of nilam as per Ext.A1 sale deed and the nilam has been used for prawn fishing as well as pokali paddy cultivation and on the eastern side of the property is puramboke kayal and property of appellants is on the immediate northern side of the plaint schedule property and in between two properties appellants have put up a bund using granite and mud and eastern boundary of appellants property is puramboke kayal and is situated in the property of respondent. At its eastern boundary through sluice water is taken and appellants have no right over the same and they attempted to trespass into the property and therefore they are to be restrained by decree for permanent

prohibitory injunction. Appellants resisted the suit contending that respondent is not in possession of the plaint schedule property and predecessor interest of respondent has only 2 acres 4½ cents and he has no right or possession over the same and on the northern boundary of said property there was a neerchal or thodu left by Paliyam family for the use and enjoyment of cultivators for fishing operation and paddy cultivation and northern property having an extent of 8 acres originally belonged to Kizhakkeveettil Ahammed Kader Haji and on his death legal heirs divided the property. Appellants are brothers and they purchased northern block of 3 acres and 42 cents out of 8 acres as per Ext.B7 sale deed and Mathew George executed Ext.B9 release deed in favour of appellants and thus they are owners in possession of 3 acres 42 cents lying on northern side of thodu and in the thodu there is a sluice as described in plaint schedule and from 1955 onwards fishing operation was jointly done in both properties including the property of respondent. The predecessor of respondent had no ownership and possession over the sluice and predecessor of the appellants owned for sluice and respondent is not

entitled to decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 5 and DWS.1 to 4 and Exts.A1 to A7 and B1 to B9 and C1 to C2(a) dismissed the suit holding that respondent did not establish the right and possession over the sluice. Respondent challenged the decree and judgment before Sub court, Kochi in A.S.20 of 1990. Learned Sub Judge on re-appreciation of evidence found that dispute is with regard to sluice which lies on east of the property and as per the boundaries shown in Exts.A1 to A5, the title deeds of respondent and Exts.B7 and B8 title deeds of appellants, eastern boundary of both properties is puramboke kayal and finding of trial court that there is a puramboke land in between kayal and property is not correct. Learned Sub Judge also found that property of respondent being the southern plot was demarcated by the Commissioner and that of appellants as northern plot was demarcated correctly in Ext.C1(a) plan and no objection was filed with regard to the demarcation of the property. Therefore accepting the demarcation in Ext.C1 (a) plan, it was found that disputed sluice falls within the property of respondent. Learned Sub Judge held that respondent is entitled to the decree in accordance with

the boundaries demarcated in Ext.C1(a) plan. Appeal was allowed and decree was granted to that extent. Decree and judgment of first appellate court was challenged in second appeal.

3. Appeal was admitted formulating following substantial questions of law.

> 1) In a suit for prohibitory injunction alone, whether courts can fix the extent or boundaries of plaint schedule property different from the one pleaded by plaintiff and grant injunction based on it.
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> 2) When it is found that under Exts.B1 and B2 plaintiff is in possession of 2 acres and 4½ cents, whether courts below are justified in identifying plaint schedule property different from the one given in the plaint and grant a decree for injunction based on it.

4. Learned counsel appearing for appellants and respondent were heard.

5. Arguments of learned counsel appearing for appellants was that in a suit for injunction, court is not competent to fix the boundary or to grant a decree for injunction in respect of the property not shown in

the plaint, but on the basis of said fixation and therefore the decree and judgment are unsustainable. Learned counsel further argued that Commissioner has not properly identified the property or demarcated the properties in Ext.C1(a) plan and therefore on the basis of Ext.C1(a) plan decree should not have been granted. Learned counsel appearing for respondent submitted that first appellate court rightly appreciated the evidence and found that respondent establish possession of the property as demarcated by the Commissioner in Ext.C1(a) plan and therefore there is no reason to interfere with the judgment passed by first appellate court.

6. True, in a suit for injunction burden is on the plaintiff to establish the identity as well as the possession. Even if plaintiff sought a decree for injunction in respect of a larger extent and court on the evidence found that entire plaint schedule property is not in the possession of the plaintiff and plaintiff could only establish possession to a portion of the property as demarcated by the Commissioner, court is not powerless to grant a decree in respect of that property if identified and established possession. Trial court did not grant the decree holding that property was not

properly identified, as in between eastern kayal and the admitted property in the possession of the parties there is a ridge and as it is puramboke land respondent is not entitled to the decree sought for. First appellate court rightly appreciated the evidence and found that boundaries in the title deeds of appellants as well as respondent prove that eastern boundary is the kayal and therefore property of appellants and respondent to extends upto the eastern kayal and there is no puramboke land in between. It is on that basis, first appellate court accepted the report submitted by the Commissioner and found that property of respondent is the southern plot as demarcated by the Commissioner and that of appellants is the northern plot as shown in Ext.C1(a) plan. It is admitted case that respondent has title to the property covered under Exts.A2 to A4 and appellants have title to the property covered under Exts.B7 and B9 title deeds. Though the Commissioner identified the property with the assistance of surveyor and submitted Exts.C1 report and C1(a) plan, first appellate court found that demarcation of the properties were not objected to by appellants and therefore accepted Ext.C1 (a) plan. Though learned counsel appearing for

appellants submitted that appellants have filed objection to Exts.C1 and C1(a) before trial court, on verifying the records no such objection is seen filed. Therefore, first appellate court was correct in accepting Ext.C1(a) plan. It is more so, because appellants did not object to the demarcation and did not even examine the Commissioner or the surveyor to prove that demarcation is not correct. If that be so, southern plot as demarcated in Ext.C1(a) plan is the property of respondent and northern property is the property of appellants.

7. Disputed sluice lies on southern portion of the property which is covered under the documents of respondent. It is on that basis first appellate court found that sluice belongs to respondent. First appellate court took note of the fact that appellants have taken two alternative contentions namely, disputed sluice forms part of their property and secondly they have got right of easement by grant over sluice. when first appellate court appreciated the evidence and found that title to the sluice belongs to respondent. It was also found that there is no evidence to prove any grant as canvassed. In such circumstance, first appellate court

held that respondent is entitled to the decree sought for. I do not find any reason to interfere with the factual finding rendered on the basis of evidence. More over, suit was only for injunction and based on the question of possession. In such circumstance, appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.879 OF 1994

2nd August 2007

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